IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18451

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

## REPLY BRIEF OF PETITIONER


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July, 1963.


PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## MISCELLANEOUS

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There is no dispute as to the facts. The legal issues are related to the situation resulting from a change in corporate domicile from New Jersey to Montana. Respondent argues that a Department of Agriculture final power permit issued to and held by the New Jersey corporation is not transferable and after the corporate merger, the New Jersey corporation lacks power to operate any property or to hold a license, for which reasons the Respondent was justified in disregarding the New Jersey corporation's application for a fair-value license under § 23 (a) of the Federal Power Act and in offering to the new Montana corporation by the order of October 12, 1962 under review, R. 1157, a net investment license under § 4, limited to a term ending in 1969 when the final power permit would have expired.

**I. Transferability of the Final Power Permit Is Not Involved**

Respondent, p. 4, concedes that the application for a license under § 23 (a) of the Act for the Mystic Lake Project was filed by the New Jersey corporation, R. 982, for the express purpose of transferring the license to the Montana corporation. Nevertheless, Respondent, pp. 9-18, argues the non-transferability of Department of Agriculture final power permits, a principle not here raised.

In its order here under review, Respondent said, R. 1158:

> The Montana Power Company, a New Jersey corporation ceased to exist as of November 30, 1961, and the Final Power Permit issued to it by the Acting Secretary of Agriculture likewise ceased to be of any legal effect from that day on.

Contrary to these erroneous conclusions, Respondent now inconsistently but correctly concedes, p. 24, n. 24, and p. 34, that the New Jersey corporation still has ample corporate existence to settle and close its affairs. This is the plain essence of Petitioner's claim here, for if the Commission should issue a license to the New Jersey corporation as herein sought, it would then be appropriate for the New Jersey corporation to surrender the final power permit and to apply for transfer of the license to the Montana corporation. The latter formality is fully within the authority of the Commission under § 8 of the Federal Power Act, 16 USC 801.

The authority of a merged corporation to continue its corporate existence long enough to settle its affairs is expressly conferred by New Jersey law in the statute cited by Respondent, p. 24, n. 24; 14 N.J. Stats. annotated, § 14; 13-4. The principle, too, is judicially well established: *New York Telephone Co.* v. *State Board of T. & A.*, 159 Atl. 810, Sup. Ct. NJ 1932; *Windhurst* v. *Central Leather Co.*, 153 Atl. 402, E. & A., NJ 1931; and 149 Atl. 36, Chan. NJ, 1930; *Otis & Co.* v. *Securities and Exchange Commission*, 323

U.S. 624, 631 (1945); *National Supply Co.* v. *Leland Stanford Jr. University*, 134 F2d 689, 692, CA 9 1943.

As admitted by Respondent, p. 4, the New Jersey corporation advised Respondent of its purpose of securing an FPC license with the express intention of transferring it to the Montana corporation, R. 707. Section 23 (a) of the Power Act, under which the New Jersey corporation applied, contains no time limitation upon such a filing and Respondent does not suggest that there is any statutory restriction of this nature. Moreover, the New Jersey corporation was the proper party to apply under § 23 (a) since it was the holder of the final power permit. The *Southern California Edison-Tule River* case cited by Respondent, p. 11, is very clear on this point, for it was the basis upon which that decision turned.

A number of licenses have been issued under § 23 (a) of the Act and subsequently transferred, some of which may be mentioned as illustrative: Project No. 78, license for Western States Gas & Electric Company, authorized July 11, 1921, 1st Ann. Rept. 26, subsequently transferred to El Dorado Power Company and later transferred to Pacific Gas & Electric Company. Project No. 99, license for Western States Gas & Electric Company, authorized November 20, 1922, 3rd Ann. Rpt. 66, subsequently transferred to Pacific Gas & Electric Company; Project No. 204, license for Grangeville Electric Light & Power Company, authorized December 13, 1922, 3rd Ann. Rpt. 85, subsequently transferred to Washington Water Power Company. Other licenses have been issued under § 23 (a) and retained by the original licensee; e.g., Project No. 382, license for Southern California Edison Company, authorized June 15, 1923, 3rd Ann. Rpt. 184; 5th Ann. Rpt. 87. And of course, many licenses have been transferred for sundry reasons, since transfer approval under § 8 of the Act is entirely independent of the original authority under which a license is issued, § 4 or § 23 (a).

Not only was the New Jersey corporation the proper and only qualified license applicant as holder of a final power permit, but the Forest Service, supervising the final power permit, insisted upon the New Jersey corporation surrendering the permit if the Commission should issue a license as requested. Pursuant to the Forest Service request, the New Jersey corporation formally advised the latter of its intention to comply with the request, R. 1138A and 1138B. Such a surrender of the final power permit would have closed the matter on the records of the Forest Service. In view of the Respondent's failure to grant a license to the New Jersey corporation, the final power permit has not yet been surrendered.

From the foregoing, it is apparent that Respondent based its refusal to grant a license to the New Jersey corporation upon its erroneous conclusion that the New Jersey corporation lacked capacity "to obtain a license," Br., p. 24. This error should now be corrected by the Court.

### II. Denial of a License Deprived the New Jersey Corporation of Vested Rights

Respondent, p. 25, misinterprets Petitioner's contentions here as asserting that the final power permit "was a contract whereby [Petitioner] and Montana-New Jersey acquired valuable contract rights which have been violated by Commission action."

This is not precisely the thrust of Petitioner's contentions in this respect. Undoubtedly, the final power permit having been accepted and acted upon by the New Jersey corporation is a valid contract insofar as it sets the rights of the permittee and restricts the United States. *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U.S. 179, 192 (1914); *El Paso County Water Improvement District* v. *City of El Paso*, 243 F2d 927, CA 5 1957, certiorari denied 355 U. S. 820.

Regardless of this, however, the final power permit is not subject to the supervision or control of Respondent.

Its terms can only be enforced by the Secretary of Argiculture and he is the official by whom it could be terminated as provided in the permit and in the statute under which it was issued, Act of February 15, 1901, c. 372, 31 Stat. 790, 16 USC 522. But more vitally, this permit was within the class granted prior to June 10, 1920 preserved by § 23 (a) of the Federal Power Act and the New Jersey corporation, as the recognized valid holder, was entitled to a fair-value license thereunder.

Rather than depending solely upon any contract right under the permit, the New Jersey corporation was relying upon its provisions, upon the statutory provisions under which the final power permit was issued and upon the corresponding statutory provisions under which the application for license was filed.

To suggest, as Respondent does on page 29 of its brief, that Respondent had discretion to refuse a license to a qualified applicant, is to suggest that Respondent may disregard the statute which it is administering when a proper case has been made for the exercise of its power. This is not the law and refusal to act under these circumstances is arbitrary and capricious. *State* v. *Doe,* 178 A2d 271, 277, S. Ct. Conn., 1962; *O'Briene* v. *Overholser,* 193 F. Supp. 652, 656, DC DC 1961; *O'Boyle* v. *Coe,* 155 F. Supp. 581, 584, DC DC 1957. Congress has imposed on courts the responsibility for assuring that its agents keep within reasonable grounds. *Universal Camera Corp.* v. *N.L.R.B.,* 340 US 474, 490 (1951); *N.L.R.B.* v. *Esquire, Inc.,* 222 F2d 253, 256, CA 7 1955.

In short, the procedure proposed was exactly what is suggested on page 18 of Respondent's brief, but it was Respondent who did not elect to follow the clear course as fully outlined in the application by the New Jersey corporation as the holder of an outstanding final power permit. Pet. Br. pp. 10-21.

### III. Limitation of the License Term To Seven Years Was Arbitrary

In addition to refusing a fair-value license to the New Jersey corporation under § 23(a) of the Power Act, Respondent limited to seven years the license under § 4 which it tendered to Petitioner, the Montana corporation. In its order of October 12, 1962, Respondent, R. 1158, refers to the fact that the final power permit would have expired on December 31, 1969 and says "that in these circumstances" the term of the license will expire on that date. No further reference was made to the termination date in Respondent's order denying rehearing, R. 1194.

In its brief, pp. 13-18, Respondent refers to prior decisions which it said developed a "uniform administrative practice" of not recognizing the transfer of final power permits originally issued by the Forest Service. As heretofore stated, *supra,* p. 3, no claim is here made that the final power permit held by the New Jersey corporation should be transferred. But if Respondent is seeking uniform administrative practice it will be found in the issuance of licenses under § 23 (a) for a full term of fifty years as authorized by the statute. It is in the license term of fifty years that Respondent has been uniformly consistent up to the present instance.

The several § 23 (a) licenses referred to herein, *supra,* p. 3, were for a full fifty-year term. There have been relatively few cases where the Commission, for special reasons expressely stated, has limited the term to less than fifty years.

In the present instance, Respondent says in its order of October 12, 1962, R. 1158, that the final power permit ceased to be of any legal effect on November 30, 1961, when the New Jersey corporation ceased to exist. We have shown, *supra,* p. 2, that these conclusions were erroneous and actually inconsistent with the present argument of Respondent on pages 24 and 34 of its brief acknowledging the continued existence of the New Jersey corporation.

Assuming, arguendo, that Respondent is correct and that the final power permit ceased to be of any legal effect upon the merger, then, instead of a license limited to 1969 the new Montana corporation should have been given a license term at least as long as Respondent is offerng for other unauthorized projects, viz., to 1993. Six license orders have already been issued containing the date of 1993: Projects Nos. 2283, 2284, 2291, 2293, 2300 and 2318.

Respondent, p. 29, says that it abandoned a practice of issuing fifty-year licenses for unauthorized constructed plants when it adopted Opinion No. 357* on April 25, 1962, licensing the Gorham project on the Androscoggin River to *Public Service Company of New Hampshire,* 27 FPC 830, 43 PUR3d 129.

The new policy on license terms to which Respondent refers as having been enunciated in Opinion No. 357, Public Service Company, is of especial interest here. In that case Respondent was discussing an unauthorized project which had been constructed originally in 1894 and never licensed. Lacking prior authority, at least two license dates were of immediate concern: (1) On what date should the license start for imposing annual charges and for other purposes? (2) When should the license period terminate?

Respondent decided that the initial license date should be July 1, 1958, the first day of the month in which it determined jurisdiction in that docket, 27 FPC at 834. In future cases it said it would tender licenses for previously un-

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* Cited by Respondent as Opinion No. 367. Respondent says its decision in *Duke Power Company* case was mentioned in Opinion No. 357 as abandoned. Opinion No. 357 says, 27 FPC at 835: "The effect of our present order is to abandon the premises enunciated in the *Carolina Aluminum* case [19 FPC 704, decided May 19, 1958] and to return to what we conceive to be the sounder principles of *Metropolitan Edison* [6 FPC 189, decided in 1947]." The *Duke Power Company* decision, 20 FPC 360, cited by Petitioner, Br. p. 24, was decided April 28, 1959.

authorized projects to be effective as of the beginning of the month in which Opinion No. 357 was issued, i.e., April 1, 1962. The initial license date for the Mystic Lake project tendered to Petitioner here was fixed at December 1, 1961, R. 1161.

The reasons given by Respondent for selecting the termination date in Opinion No. 357 are not at all applicable here for at least two reasons: First, the basis of jurisdiction here is not navigability, as it was in the Public Service Company case, Opinion No. 357, but the occupancy of Government lands. The Mystic Lake project is located on lands of the United States within the Custer National Forest, R. 1127.

Second, Respondent concluded that the Mystic Lake project had been operated under a valid final power permit at least up to November 30, 1961, the day before the proposed effective date of the tendered license. This prior federal authorization and location of the project on Government lands removes the Mystic Lake project from the class of previously unauthorized projects covered by Opinion No. 357.

Moreover, the year 1943 does not have the significance suggested by Respondent. In opinion No. 357 Respondent said that the Androscoggin River on which the Gorham project of Public Service Company is located, is a navigable water of the United States, but that the concept of navigability had evolved only gradually and had not attained its present dimensions to include logging until 1943. Prior to 1943, Respondent said, it might have been reasonable for a company to assume that the Commission would not assert jurisdiction over a project situatetd in a stream in which the sole traffic was the driving of logs. But in 1943, Respondent said, 27 FPC at 833-834:

> Three Commission decisions based findings of navigability primarily upon evidence of log driving and

rafting. One of these decisions, involving the Tomahawk project on the Wisconsin River, was affirmed in 1945 by the Court of Appeals for the Seventh Circuit [*Wisconsin Public Service Corporation* v. *F.P.C.*, 147 F2d 743, certiorari denied, 325 U.S. 880].

There is nothing in the decision of the Seventh Circuit or in the three Commission decisions to which Respondent refers which would indicate that there had been any change in the legal criteria to be applied as a test of navigability. Quite the contrary. The Seventh Circuit examined many of the early decisions on navigability, including *The Daniel Ball*, 77 U.S. 557, 563, decided in 1870, where it said it found "an early and instructive discussion of the question . . ." (147 F2d at 747). In addition to a long list of court decisions on navigability, the Seventh Circuit also leaned heavily on the definition of navigable waters found in § 3 (8) of the Federal Power Act, 16 USC 796, adopted in 1920.

Furthermore, there are many acts of Congress permitting the erection of dams on navigable waters of the United States conditioned by Congress to be so designed as to pass logs, timber and lumber without unreasonable delay or hindrance and without tolls or charges* and at least one authorization for river improvement to make a river navi-

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* Mississippi River at St. Cloud, 23 Stat. 154; Mississippi River at Little Falls, 24 Stat. 123; Missouri River above Fort Benton, 28 Stat. 91; Mississippi River near Minneapolis, 30 Stat. 253; Rainy Lake River, Minnesota, 30 Stat. 398; Mississippi River at Grand Rapids, 30 Stat. 904; St. Croix River, Wisconsin, 32 Stat. 802; Mississippi River at Sauk Rapids, 33 Stat. 52; 33 Stat. 723; Mississippi River (Wright County, Minn.) 33 Stat. 66; Mississippi River (Stearns County, Minn.) 33 Stat. 295; Missouri River, Montana, 33 Stat. 570; Mississippi River, Bemidji, 33 Stat. 1043; Pea River, Coffee County, Alabama, 34 Stat. 18; Choctawhatchee River, Dale County, Alabama, 34 Stat. 102; St. Joseph River, Berrien County, Mo., 34 Stat. 102; Missouri River near Helena, 34 Stat. 111; Pend d'Orielle River, Wash., 34 Stat. 205; Mississippi River at Monticello, 34 Stat. 264; Mississippi River at Clearwater, 34 Stat. 266; Crow Wing River, Minn., 34 Stat. 296; Mississippi River, Stearns County, Minn., 34 Stat. 537; Mississippi River, Morrison County, Minn., 34 Stat. 209, 34 Stat. 1219.

gable for floating logs, Act of March 3, 1901 (31 Stat. 1455). On May 9, 1900 (31 Stat. 172) Congress eliminated a prohibition contained in an earlier River and Harbor Act to permit the floating of loose timber and logs and sack rafts of timber and logs if they were "the principal method of navigation."

These statutes and the court decisions referred to accept the navigability of streams for the transportation of logs and rafts. This concept was not new by 1943 as Respondent itself acknowledges. In Opinion 357, Respondent said, 27 FPC at 835:

> We find no basis, however, either in the language of the Act or its legislative history, for the conclusion that a river does not become "navigable," or a license necessary, until the Commission or some other authority has so ruled. On the contrary, Section 23(b) flatly proscribes the unlicensed operation of a power project "in navigable waters," and Section 3(8), which defines "navigable waters," is addressed directly to the project owners no less than to the Commission.

In the present instance there has never been a question as to the occupancy of Government lands by the Mystic Lake project. The year 1943, therefore, has no significance for determining the end of the license period.

Respondent, p. 32, says that it fixed the license termination date for the Mystic Lake project at December 31, 1969 because that is the same date on which the final power permit would have expired, "thus affording Congress an opportunity, if it saw fit, to make other arrangements for the disposition of the project." The possible interest of Congress in making "other arrangements for the disposition of the project" was not mentioned in the order of October 12, 1962 under review, R. 1157.

The primary purpose of the licensing provisions of the Federal Power Act to provide a vehicle for the acquisition by the United States of all licensed projects as now

conceived by Respondent is a new concept never before stated by Congress, by the courts or by Respondent, and actually contrary to the stated purpose and legislative history of this statute.

The Act was dedicated to "encouraging private enterprise and the investment of private capital" in power projects on a basis consistent with the public interest. House Report No. 61, 66th Congress, 3rd session. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest." Statement of David F. Houston, Secretary of Agriculture. Id., at 5. *F.P.C.* v. *Niagara Mohawk Power Corporation,* 347 U.S. 239, 251; *United States ex. rel. Chapman* v. *F.P.C.,* 345 U.S. 153, 167, 168; *First Iowa Hydro-Electric Cooperative* v. *F.P.C.,* 328 U.S. 152, 180, 181; *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 427.

Respondent's First Annual Report, p. 5, refers to the construction already started under licenses as "abundant evidence both of the extent to which former legislation stood in the way of power development, and of the generally satisfactory character of the present legislation."

Nor does Respondent mention in this connection the severe license conditions imposed by the Federal Power Act and discussed in the foregoing judicial opinions, nor the complete protection of the right of federal acquisition made a part of each license. For one thing, the proviso of § 14 expressly reserves the right of the United States or any State or municipality to take over, maintain, and operate any licensed project "at any time by condemnation proceedings upon payment of just compensation" (16 USC 807).

Moreover, before it issues any license, the Respondent is required by § 7 (b) of the Act to decide whether non-federal

power development shall be permitted or development of the particular water resources should be undertaken by the United States itself (16 USC 800). If it so decides, it may not approve the application but must make an appropriate examination and submit its findings to Congress with recommendations. If Respondent shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, "no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto. . . ." § 4 (e), (16 USC 797).

Pursuant to the requirements of § 7(b), Respondent made the following finding in authorizing the license for the Mystic Lake project, R. 1160:

> (5) The issuance of a license for the project will not affect the development of any water resources for public purposes which should be undertaken by the United States.

Congress included these safeguards in the statute so that all proper public interests would be protected and at the same time non-federal water power development could be permitted for fifty-year periods. It did not say, as Respondent now does for the first time, that the required examination of possible federal ownership should be made every seven years as provided in the order of October 12, 1962.

The finding on federal interest having already been made in the order of October 12, 1962 issuing the proposed Mystic Lake license, Congress has provided, by the fifty-year license term, that it is not required for another fifty years.

It is apparent, therefore, that Respondent arbitrarily selected the year 1969 for terminating the license offered to Petitioner for the Mystic Lake project. It should be required in the present instance to fix a termination date

of fifty years from the effective date of the license, as it did in Opinion No. 357, Public Service Company of New Hampshire, *supra,* upon which it otherwise relies.

### IV. The Petition for Review Is Properly Filed

Respondent asserts, p. 34, that the Montana corporation is not the proper party to raise the license question here, for the New Jersey corporation alone was the applicant for a § 23 (a) license.

The obvious answer is that it was the Respondent, not the Petitioner, that directed the order of October 12, 1962 to the Montana corporation and purported to make it the licensee. As the named licensee, the Montana corporation is aggrieved by the order. Had the New Jersey corporation filed for court review, no doubt Respondent would then have claimed it was no longer in existence as stated in the order of October 12, 1962, and that the order was directed to the Montana corporation. Surely justice is not to be thwarted in this manner.

## CONCLUSION

The order of October 12, 1962, tendering a seven-year license under § 4 of the Federal Power Act to Petitioner as a substitute for the fifty-year license under § 23 (a) applied for by the New Jersey corporation should be set aside and the Respondent should be directed to issue a fifty-year license to the New Jersey corporation, therby allowing the latter to seek approval for transfer of the license to the Montana corporation, Petitioner herein.

Respectfully submitted,

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### Certificate

I certify that I have examined Rules 18 and 19 of this Court and that, in my opinion, the foregoing brief is in full compliance with those rules.

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*Attorney.*